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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 449

MARDEN & MURPHY, INC.,

Appellant,

vs.

CITY OF LOWELL,

Appellee

STATEMENT AS TO JURISDICTION ON APPEAL

Now comes the appellant, Marden & Murphy, Inc., in the above entitled cause (respondent below) and in support of the jurisdiction of this Court to review said cause on appeal respectfully represents.

I

Statutory Provision Sustaining Jurisdiction

This appeal is claimed under the provisions of the Judicial Code, Section 237(a), as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937; 28 U. S. C., Section 344(a); because there is drawn in question in this cause the validity of a statute of the Commonwealth of Massachusetts on the ground of its being repugnant to the

Fourteenth Amendment to the Constitution of the United States, and the decision is in favor of its validity.

II

The Massachusetts Statute the Validity of Which Is Involved

The Massachusetts statute which is drawn in question is Chapter 478 of the Acts of 1938, amending General Laws (Ter. Ed.), Chapter 59, dealing with proceedings by the taxpayer to secure abatement of assessments claimed to be excessive or illegal. This statute, which became effective July 1, 1938, as applied to any case where the tax on a parcel of real estate was more than $1,000, required the taxpayer, before he could appeal from the refusal or failure of the Assessors to grant an abatement—in other words before he could obtain *any hearing*, other than by the assessing board itself, as to the validity and amount of his tax, either (1) to pay (substantially) the entire tax as assessed or (2) to pay (substantially) one-half the tax and to show to the satisfaction of the Appellate Tax Board that he was unable presently to pay the balance. It mattered not whether questions of law or even questions of constitutional right might be involved; and it mattered not whether the taxpayer had the necessary funds to make the payment. Unless the payment was made, the taxpayer was denied any hearing.[1]

III

Date of Decree and Date of Application for Appeal

The case was tried in the Land Court for the County of Middlesex and Commonwealth of Massachusetts, and following the decision of that Court, which was rendered March 29, 1946, the case was appealed by both petitioner

[1] This statute, St. 1938, c. 478, (except section 4, not here material), is set out in full in an appendix to this statement.

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and respondent to the Supreme Judicial Court of Massachusetts.

The opinion of said Supreme Judicial Court of Massachusetts was handed down September 11, 1947, and a rescript was filed on said date in said Land Court embodying an order "that the Recorder of said Court in said County make the following entry under said case in the docket of said Court viz.—Decision Affirmed."

The final decree of the Land Court entered pursuant to said rescript was entered on October 23, 1947.

The application for appeal was presented on the 23rd day of October, 1947.

IV

Nature of the Case and Ruling Below

Express Ruling by the Massachusetts Court Held the Statute Valid

The Land Court of Massachusetts held that this statute *did not violate the Appellant's rights under the Fourteenth Amendment* (R. 30),[2] and on the appeal to the Supreme Judicial Court of Massachusetts the decision of the Land Court was *affirmed,* and the statute was expressly held to be constitutional. The Court said: (at page 2 of copy of opinion hereto annexed)

> "By St. 1938, c. 478, s. 3 (G. L. (Ter. Ed.) c. 59, s. 65B), where a tax on a parcel of real estate exceeds $1,000, a payment, generally of half the tax, must be made as a condition of appeal to the Appellate Tax Board. It is settled that such a payment may constitutionally be made a condition of a hearing upon an application or an appeal for abatement, *regardless of the financial condition of the taxpayer, Old Colony Railroad* v. *Assessors of Boston,* 309 Mass. 439. *Lincoln*

[2] References unless otherwise specified are to the printed record in the State Court.

> *Hotel Co.* v. *Assessors of Boston*, 317 Mass. 505. We remain satisfied with those decisions, which are decisive as to the present objection raised by the respondent." (Italics ours.)

Both cases cited by the Court involved the same statute, which is in issue here, namely, St. 1938, c. 478. In the *Old Colony Railroad* case the taxpayer's objections under the due process and equal protection clauses were both expressly considered (pp. 446, 450), and the statute was held valid. In the *Lincoln Hotel Company* case the taxpayer expressly requested a ruling that the statute requiring payment before appeal violated the due process and the equal protection clauses of the Fourteenth Amendment (p. 506) but the Court again held the statute valid.

The decision of the Massachusetts Court in the present case, therefore, necessarily held that the statute was not repugnant to the Fourteenth Amendment.

Without searching the record further, appellant submits that this express decision by the State Court is sufficient to establish the jurisdiction of the Supreme Court of the United States on this appeal.

In *Charleston Association* v. *Alderson*, 324 U. S. 182, 185-186, this Court said:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the Court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised where such question appears to have been actually considered and decided by that court."

The record, however, shows that the issue of denial of constitutional right by this restrictive statute was clearly raised.

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Validity of the Statute Was Clearly in Issue

This case is a proceeding by the City of Lowell in the Land Court of Massachusetts to foreclose the liens claimed by it under four tax takings made by the Collector of Taxes of the City of Lowell, all dated August 17, 1942, purporting to take the lands of the respondent Marden & Murphy, Inc. therein described, for taxes assessed against the respondent for the years 1933 to 1941 inclusive.

In order to appreciate fully the extent to which this statute infringed upon the taxpayer's rights it is necessary to consider briefly the method provided by the Massachusetts law whereby the taxpayer may obtain a review of assessments on his real estate, and the effect of the statute complained of on the statutes as they previously existed.

Abatement Proceedings Under Statute Are the Taxpayer's Sole Recourse

Proceedings for abatement in Massachusetts are governed wholly by statute. Before discussing the provisions themselves we should note that the Massachusetts Court has held in many cases that these statutory proceedings for abatement are the *only* remedy available to the taxpayer to obtain reduction of assessments claimed to be excessive or invalid.

Old Colony Railroad Co. v. *Assessors of Boston*, 309 Mass. 439, 442 (1941);

Wynn v. *Assessors*, 281 Mass. 245, 248 (1932);

Central National Bank v. *Lynn*, 259 Mass. 1, 6-7 (1927), 266 Mass. 145 (1929).

The Land Court expressly so held in this case (R. 26) and on the appeal the Supreme Judicial Court again ex-

pressly stated the same rule when it said (pp. 1-2 of copy of opinion annexed):

> "If the inclusion of the value of the water power was wrong, the only remedy of the respondent was by a petition for abatement."

In *Eastern Racing Association* v. *Revere*, 300 Mass. 578 (1938) the Court said Dolan, J., pp. 581-582,

> "In creating what is now the Appellate Tax Board, it was the clear intention of the legislature to establish a *comprehensive system* whereby *all appeals* from the actions of taxing authorities of the Commonwealth and its municipalities *should be heard and determined by that Board.*" (Italics ours.)

In *Hayward* v. *Assessors of Boston*, 304 Mass. 355 (1939) where the Appellate Tax Board had declined to accept an appeal from a Board of Assessors on the ground that no part of the tax had been paid, the Supreme Judicial Court of Massachusetts held that it was without jurisdiction to consider an appeal from that decision of the Board on the ground that the Board's decision was not a decision "upon an appeal" from the Board of Assessors but was merely a decision that such an appeal could not be filed. The Court said at page 357

> "The petitioner's right of appeal from the board to this court is necessarily bounded by the statute governing such appeals. He has no extra-statutory and anomalous rights of appeal."

The Statutory Provisions as They Existed Before St. 1938, c. 478

The provisions governing proceedings for abatement are found in the General Laws of Massachusetts (Ter. Ed.) Chapter 59. In Section 59 of that chapter it is provided that "a person aggrieved by the tax assessed upon him

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may . . . on or before October first of the year to which the tax relates . . . apply in writing to the Assessors, on a form approved by the Commissioner, for an abatement thereof." Later sections give certain rights of appeal if the Assessors refuse or fail to grant satisfactory abatement.

Before the enactment of St. 1938, Chapter 478, the taxpayer was free to appeal either to the County Commissioners or to the Appellate Tax Board within sixty days after notice of the Assessors' decision. If the Assessors failed to act upon the application prior to the expiration of four months from the date it was filed, it was deemed to be refused, and the appeal, either to the County Commissioners or to the Appellate Tax Board, must be filed within ninety days thereafter. The appeal to the County Commissioners was governed by G. L. (Ter. Ed.) c. 59, s. 64 as this section then read. It had been amended a number of times but is set out in its then form in St. 1937, c. 400, s. 6. The appeal to the Appellate Tax Board was governed by G. L. (Ter. Ed.) c. 59, s. 65. As it then stood, this section is found in St. 1933, c. 167, s. 1.

The right of appeal, either to the County Commissioners or to the Appellate Tax Board, was *free* and *unqualified*. There was *no condition precedent*. It is not questioned but that these remedies were fair and adequate.

The Statute Complained of (St. 1938, c. 478)

The statute complained of, however, St. 1938, c. 478, which became effective July 1, 1938, introduced drastic limitations.[3]

By Section 1 of said St. 1938, c. 478, s. 64 of said Chapter 59 was amended by inserting as a condition precedent to

[3] In this statute as set out in the appendix to this statement, the material language which was inserted by it in G. L. (Ter. Ed.), c. 59, s. 64 and s. 65 is indicated in italics. The new section 65B is of course set out in full.

an appeal from the Board of Assessors to the County Commissioners that the taxpayer, where his tax is more than $1,000 on a parcel of real estate, must have paid the *entire* tax or under an alternative provision an amount *approximating* the entire tax. It also inserted an express provision that if the Assessors did not act upon the application for abatement within the four months from date it was filed, they should have no further authority to act thereon, except that during the further ninety day period allowed for appeal, they could agree with the applicant in final settlement of his application, or they could grant abatement as to any tax "as to which an appeal has been seasonably taken."

By Section 2 of said St. 1938, c. 478, s. 65 of said Chapter 59 was amended by inserting the same condition precedent to an appeal to the Appellate Tax Board, namely, that the entire tax or an amount approximating the entire tax must be paid before appeal could be taken.

Section 3 of said St. 1938, c. 478 introduced a *new section* to be designated Section 65B of said G. L. (Ter. Ed.) c. 59. By this section the taxpayer whose tax exceeded $1,000 on a parcel of real estate was permitted, *after he had paid one-half* the amount required under the previous section, to *petition* the Appellate Tax Board *for leave to file an appeal,* and if he could show to the satisfaction of the Board that he was unable presently to pay the balance of the tax, the Board could permit him to file his appeal; otherwise he had no recourse. It is to be noted that he could not even petition the Board for leave to file an appeal until after he had paid (approximately) one-half the tax. This requirement *effectively prevented the respondent from obtaining any hearing whatever* as to the validity or amount of its assessments for 1938 and 1939 because it was *wholly unable financially to make the required payments.*

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While this new section *in form* gave a right of appeal, it really imposed an obstacle on the road to the Appellate Tax Board *which had never existed before.* Its only virtue was that the condition imposed was a little less harsh than that which was injected into sections 64 and 65 by the same act. The whole purpose of the new statute was not to confer rights but to take away rights which previously existed. It imposed a drastic limitation on the right of any taxpayer whose land was taxed for more than $1,000 to obtain *any review* of the decision of the Assessors, or *any hearing whatever,* in any case where, as here, the Assessors have seen fit not to make any decision.

There is no way in which the assessing board itself could be compelled to grant a hearing, even if a hearing before the assessors would have been adequate. The statute contains no affirmative requirement that they shall either grant a hearing or make a decision. Mandamus would not have lain to compel the Assessors to grant a hearing,

Eastern Racing Association v. *Revere* 300 Mass. 578 (1938) and even if mandamus would have lain, it would have been futile, and no taxpayer could have hoped by mandamus to compel a hearing by the Assessors within the statutory period of ninety days following their four months period of inaction, during which the time for appeal was running. The express provision in the statute that, if the Assessors *fail* to act on an application within four months from the date it is filed it shall be deemed to be refused, is an express recognition of the fact that the Assessors *are not required to do anything* unless they choose to do so.

In any event in a case like the present, a hearing merely before the Board of Assessors would have been wholly inadequate, for questions of law must be passed on by a *judicial* tribunal,

Ohio Valley Water Company v. *Ben Avon Borough* 253

U.S. 287 (1920) and in any case where, as in this case, the taxpayer claims his *constitutional* rights have been violated, he is entitled to a review of both *law and facts* by some tribunal *other* than the Board which levied the assessment. *Chicago, Burlington & Quincy Railroad* v. *Osborn* 265 U. S. 14 (1924).

The imposition of the requirement of payment of all or half the tax as a condition precedent to an appeal from the Assessors to the Appellate Tax Board is thus in reality the imposition of this requirement of payment as a condition precedent to *any* hearing. The statute which imposed this condition of payment with which Appellant, being without the necessary funds, was unable to comply, barred the Appellant's path at the threshold of the Appellate Tax Board, and *prevented any hearing;* and it is this statute which Appellant contends is repugnant to the Fourteenth Amendment. With this preliminary and necessary knowledge of the Massachusetts law as to abatements, we believe the import of the Appellant's contentions will be clear.

Appellant's Contentions Below and the Rulings Thereon

The Appellant, in paragraph 21 of its amended answer to the petition (R 11), set up that its right to proceed by petition for abatement of its assessments was restricted by said statute St. 1938, c. 478, so that it was obligated as a condition of obtaining any relief from the refusal or failure of the Assessors to grant abatement as regards taxes for 1938 and subsequent years to pay one-half the tax assessed; that it had sought abatement for 1938 and 1939 by appropriate applications filed with the Assessors, but that the Assessors failed to act thereon or to afford any hearing, that the Appellant filed appropriate appeals with the Appellate Tax Board, but *without* payment of tax as required by the statute, because it was wholly unable financially to make such payment, that the Appellate Tax Board dis-

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missed said appeals, solely because of said statute, and Appellant's inabilty to make the required payments, and without hearing on the merits; and that the denial of relief herein would involve a denial of due process and of equal protection within the prohibitions of the Fourteenth Amendment.

The record shows that these applications filed by the Appellant with the Assessors seeking abatement for both 1938 and 1939 and the further efforts of Appellant to appeal to the Appellate Tax Board and there obtain a hearing as to both said years included *each of the three parcels* designated in the petition as Parcels 1, 2 and 3 (Ex. 53-57 inclusive; Ex. 85-88 inclusive).

The statute was the sole ground upon which relief was denied; and the question whether it was repugnant to the Fourteenth Amendment was thus directly in issue.

In paragraph 16 of the Appellant's Requests for Rulings before the Land Court, Appellant asked a ruling in substance that the assessments so made without opportunity for hearing (which was barred by the statute) were invalid and that a decision sustaining the takings based thereon would violate Appellant's rights under the due process and equal protection clauses of the Fourteenth Amendment. (R 49) The trial court refused this ruling. (R 45) It upheld the statute and held that the Appellant's rights under the Fourteenth Amendment had not been violated (R 30); and when the Supreme Judicial Court of Massachusetts affirmed the decision of the Land Court it *necessarily held* that the statute did not violate Appellant's rights under the Fourteenth Amendment. The final decree of the Land Court pursuant to the rescript was accordingly entered on October 23, 1947.

By the decision, order and decree below the assessments for 1938 and 1939 as to Parcels 1, 2 and 3 were held valid,

notwithstanding that the Appellant, pursuing the only remedy open to it under the law of Massachusetts, had been denied a hearing, solely because of the restrictive provisions in the statute, with which it was unable to comply.

This issue is not only substantial but vital because if the statute which prevented Appellant from obtaining a hearing on the validity and amount of its assessments is repugnant to the Fourteenth Amendment, the assessments in question must be void and the takings based thereon of no effect.

It is true, that, as to Parcel 1, notwithstanding the conclusion of the Court that the *assessments* thereon were valid and proper, the City's petition for foreclosure as to that parcel was denied because, as to one of the years in question, 1938, separate assessments had been made on two portions of it, and the Court held that the parcel could not be taken as a whole for nonpayment of the combined tax upon the constituent lots. This was solely a rule of Massachusetts law, and notwithstanding this rule, it is submitted that the validity of the assessments on Parcel 1 is still material in this case, because of the provisions of G. L. (Ter. Ed.) c. 60, s. 37, which reads in material part as follows:

> "If while such lien is in force a tax sale or taking has been made, . . . but the sale or taking is invalid by reason of any error or irregularity in the proceedings *subsequent to the assessment*, the lien and also the lien or liens for any subsequent taxes or charges which have been added to the tax title account under authority of section sixty-one shall continue . . . for ninety days after the sale or taking has been finally adjudged invalid by a court of competent jurisdiction." (Italics ours.)

It cannot be doubted that the City will immediately proceed to make another sale or taking on the assumption that its lien is continued in effect by this statute.

But whether or not the validity of the assessments as to *Parcel 1* is properly in issue on this appeal, the *validity of the similar assessments on Parcels 2 and 3 is clearly in issue;* for as to Parcels 2 and 3 the decree below held both the *assessments* and the *takings* based thereon to be *valid*, and decreed that the Appellant's rights be foreclosed. There was the same *denial of any hearing* as to the 1938 and 1939 taxes on *all three parcels.* All the pertinent facts were precisely the same. This denial of hearing was *for the same reason* in each case, namely, *because of the requirements of the statute.* The validity of the assessments as to Parcels 2 and 3 being directly in issue, the validity of the statute which prevented those hearings is likewise directly in issue.

It is respectfully submitted that the jurisdiction of the Supreme Court of the United States on appeal under Section 237(a) of the Judicial Code is clearly established.

BURTON E. EAMES,
Counsel for Appellant, Marden & Murphy, Inc.

APPENDIX "A"

St. 1938, c. 478

(This statute amended General Laws, Chapter fifty-nine, sections sixty-four and sixty-five, by inserting additional provisions. It also added a new section designated sixty-five B. In the following the *language inserted by this statute in sections sixty-four and sixty-five is italicized.* If we omit the italicized words, we have sections sixty-four and sixty-five substantially as they previously existed.[4]

An Act relative to abatement of certain taxes.

Whereas, The deferred operation of this act would tend to defeat its purpose, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

Section 1. Chapter fifty-nine of the General Laws is hereby amended by striking out section sixty-four, as most recently amended by section six of chapter four hundred of the acts of nineteen hundred and thirty-seven, and inserting in place thereof the following:—*Section 64.* A person aggrieved by the refusal of assessors to abate a tax *on personal property which has been paid, or a tax of not more than one thousand dollars on a parcel of real estate, or a tax of more than one thousand dollars on a parcel of real estate which tax either has been paid or on account of which there has been paid a sum not less than the amount which would be assessable in said year upon a valuation equal to the average of the valuations of said parcel, as reduced by reason of abatements, if any, for the three years next preceding said year,* may, within sixty days after receiving the notice provided in section sixty-three, or within ninety days after the time when the application for abatement is deemed to be refused as hereinafter provided, appeal therefrom by filing a complaint with the clerk of the county com-

[4] The only exceptions were the following:—in line 16 of Section 1 the words "section sixty-three" were substituted for "the preceding section" and in line 8 of Section 2 the words "Appellate Tax Board" were substituted for "Board of Tax Appeals."

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missioners, or of the board authorized to hear and determine such complainants, for the county where the property taxed lies, and if on hearing the board finds that the property has been overrated, *and that the complainant has complied with all applicable provisions of law,* it shall make a reasonable abatement and an order as to costs. Whenever a board of assessors, before which an application in writing for the abatement of a tax is or shall be pending, fails to act upon said application, except with the written consent of the applicant, prior to the expiration of four months from the date of filing of such application it shall then be deemed to be refused *and the assessors shall have no further authority to act thereon; provided, that during the period allowed for the taking of an appeal the assessors may by agreement with the applicant abate the tax in whole or in part in final settlement of said application, and shall also have the authority granted to them by section seven of chapter fifty-eight A to abate, in whole or in part, any tax as to which an appeal has been seasonably taken.* If the list of personal property required to be brought in to the assessors was not brought in within the time specified in the notice required by section twenty-nine, no tax upon personal property shall be abated unless the board appealed to finds good cause for this delay or unless the assessors have so found as provided in section sixty-one, or unless such tax exceeds by fifty per cent the amount which would have been assessed on such estate, if the list had been seasonably brought in, and in such case only the excess over such fifty per cent shall be abated. A tax or assessment upon real estate may be abated although no list of property was brought in within the time specified by the notice required by section twenty-nine; provided, that the application for an abatement of such tax or assessment included a sufficient description of the particular real estate as to which an abatement is requested.

Upon the filing of a complaint under this section the clerk of the county commissioners or of the board authorized to hear and determine the same shall forthwith transmit a certified copy of such complaint to the assessors and the assessors or the city solicitor or town counsel may within thirty days after receipt of said copy give written notice to said

clerk and to the complainant that the town elects to have the same heard and determined by the appellate tax board. Thereupon, the clerk of the county commissioners or of the board authorized to hear and determine such complaints shall forward all papers with respect to such complaint then in the file of the county commissioners or other such board to the clerk of the appellate tax board and proceedings with respect to such complaint shall thenceforth be continued as provided in chapter fifty-eight A. If upon hearing *it appears that the complainant has complied with all applicable provisions of law* and the appellate tax board finds that the complainant is duly entitled to an abatement, it may grant him such reasonable abatement as justice may require, and shall enter an order directing the treasurer of the town to refund said amount, if the tax sought to be abated has been paid, together with all charges and interest at five per cent on the amount of the abatement from the date of the payment of the tax. The board may make such order with respect to the payment of costs as justice may require.

Section 2. Said chapter fifty-nine is hereby further amended by striking out section sixty-five, as most recently amended by section one of chapter one hundred and sixty-seven of the acts of nineteen hundred and thirty-three, and inserting in place thereof the following: *Section 65.* A person aggrieved as aforesaid may, instead of pursuing the remedy provided in section sixty-four; but subject to the same conditions, appeal to the appellate tax board by filing a petition with such board within sixty days after receiving the notice required by section sixty-three, *or within ninety days after the time when the application for abatement is deemed to be refused as provided in section sixty-four.* Such appeal shall be heard and determined by said board in the manner provided by chapter fifty-eight A. The board may enter such order as justice may require in the manner provided in the preceding section with respect to complaints removed from the county commissioners.

Section 3. Said chapter fifty-nine is hereby further amended by inserting after section sixty-five A the following new section: *Section 65B.* A person aggrieved by the

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refusal of assessors to abate a tax of more than one thousand dollars on a parcel of real estate, on account of which tax there has been paid either a sum not less than one half of the amount of such tax or a sum not less than one half of the amount which would be assessable in said year upon a valuation equal to the average of the valuations of said parcel, as reduced by reason of abatement, if any, for the three years next preceding said year, who claims to be unable presently to pay the amount of tax remaining unpaid, may, within sixty days after receipt of the notice provided in section sixty-three, or within ninety days after the time when the application for abatement is deemed to be refused as provided in section sixty-four, petition the appellate tax board for leave to file an appeal therefrom to said board. Such petition shall allege that the petitioner is unable presently to pay such amount of tax, and that, except for failure to comply with the provision of section sixty-four relative to payment of such tax, the petitioner is entitled to an appeal under section sixty-five, and shall be filed with the clerk of the appellate tax board. A notice of the filing of such petition shall be given by said clerk to the appropriate assessors within five days from the date of the filing of such petition, in such form and in such manner as the appellate tax board shall by rule provide, and a hearing, due notice of which shall have been given, shall be had on such petition not later than twenty days from the date of the filing thereof. Such petition shall be heard by a single member of said board. If such member finds the allegations in such petition to be true, he may by order, grant leave to such petitioner to file such appeal, within ten days from the entry of said order, upon such conditions as may be imposed therein, which may require such petitioner to pay, in whole or by installments, the amount of the tax remaining unpaid, as a prerequisite to any hearing on the merits of the appeal filed under said order. If the complainant fails to comply with any of the conditions imposed in said order an appeal filed thereunder may, upon motion, be dismissed by any member of said board. If the complainant complies with the conditions imposed in said order the appeal filed thereunder shall thereafter be heard and determined by said board in the manner provided by chapter

fifty-eight A. The board may enter such order as justice may require in the manner provided in section sixty-four with respect to complaints removed from the county commissioners.

(Section 4 is omitted.)

APPENDIX "B"

City of Lowell, Petitioner,

v.

Marden & Murphy, Inc., Respondent

Lummis, J.:

This is a petition filed in the Land Court on August 21, 1944, to foreclose all rights of redemption in four parcels of land in Lowell which were taken by the petitioner on August 17, 1942, for the nonpayment of taxes for the years 1933 to 1941, both inclusive. G. L. (Ter. Ed.) c. 60, s. 65, as amended by St. 1933, c. 325, s. 12, and by St. 1938, c. 305. Four parcels were taken, as follows: parcel 1, eighty-nine thousand seventy-nine square feet, located northerly of Jackson Street; parcel 2, forty-nine thousand six hundred twenty-nine square feet, located northerly of Jackson Street; parcel 3, nine thousand nine hundred forty-four square feet, located southerly of Jackson Street; and parcel 4, three thousand two hundred fifteen square feet, located southerly of Jackson Street. No two of these four parcels are contiguous to each other. Marden & Murphy, Inc., the owner, and Hamilton Company, a mortgagee, appeared and answered. The Land Court decided in favor of the petitioner as to parcels 2, 3 and 4, and against it as to parcel 1. Both the petitioner and Marden & Murphy, Inc., appealed. Since no other respondent appeared or argued in this court, Marden & Murphy, Inc., will hereinafter be called the respondent.

The first point taken by the respondent is that in the assessment of parcels 1 and 2 the respondent was assessed for water power that it did not own. But the water power

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was not assessed as a separate piece of property. Its value merely enhanced the value of the land, as in other cases in which valuable water power has been considered for purposes of taxation. *Essex Co.* v. *Lawrence*, 214 Mass. 79, 90, 91. *Assessors of Lawrence* v. *Arlington Mills*, 320 Mass. 272, 276. If the inclusion of the value of the water power was wrong, the only remedy of the respondent was by a petition for abatement. *Central National Bank* v. *Lynn*, 259 Mass. 1, 7, *S. C.* 266 Mass. 145. *Codman* v. *Assessors of Westwood*, 309 Mass. 433, 435.

The respondent contends that the tax taking for the taxes of 1938 and 1939 was invalid because the respondent had had no opportunity to obtain a reduction in the valuation. It is not disputed that the tax was greater than the amount for which an abatement might be sought without payment upon the tax, under G. L. (Ter. Ed.) c. 59, ss. 64, 65, as amended. By St. 1938, c. 478, s. 3 (G. L. (Ter. Ed.) c. 59, s. 65B), where a tax on a parcel of real estate exceeds $1,000, a payment, generally of half the tax, must be made as a condition of appeal to the Appellate Tax Board. It is settled that such a payment may constitutionally be made a condition of a hearing upon an application or an appeal for abatement, regardless of the financial condition of the taxpayer. *Old Colony Railroad* v. *Assessors of Boston*, 309 Mass. 439. *Lincoln Hotel Co.* v. *Assessors of Boston*, 317 Mass. 505. We remain satisfied with those decisions, which are decisive as to the present objection raised by the respondent.

The respondent contends that the assessments in question were invalid because the description of the property assessed was inadequate. At most the variances from the correct area were one thousand seven hundred forty-five square feet as to parcel 1, out of an area of eighty-nine thousand seventy-nine square feet; four hundred forty-one square feet as to parcel 3, out of an area of nine thousand nine hundred forty-four square feet; and two hundred eighteen square feet as to parcel 4, out of an area of three thousand two hundred fifteen square feet. The locations of the parcels in the assessment book were sufficient to identify them. In *Roberts* v. *Welsh*, 192 Mass. 278, 280, this

court said that the statutes do not intend that the description in a valuation list "should necessarily be accurate in detail for the purpose of a conveyance. It is enough if it fairly designates, for the information of those interested, the property intended to be taxed." See also *Lenox* v. *Oglesby*, 311 Mass. 269, 274. The judge was right, we think, in finding that the taxpayer knew what property was being assessed, and was not misled. *Franklin* v. *Metcalfe*, 307 Mass. 386, 389, 390. *Boston* v. *Boston Port Development Co.*, 308 Mass. 72, 78.

The respondent raised, but did not argue in this court, the point that the abatement of the taxes for the years 1930, 1931 and 1932 prevented the tax from being lawful. Of course the abatements destroyed any tax lien for the taxes of those years. No later sale or taking for those years was ever made. Nothing in that transaction prevented the taking in question for nonpayment of the taxes of later years. See *Newton* v. *Noone*, 319 Mass. 374.

The land in question was sold by the Collector of taxes to the city of Lowell on March 17, 1937, but on petitions to foreclose the rights of redemption from that tax sale the Land Court, on May 21, 1942, held the tax title conveyed by such sale to be invalid, and the petitions were dismissed. After disclaimers of such tax title, a new taking was made on August 17, 1942. The respondent contends that the assessments of taxes to it for the years 1937 to 1941, inclusive, were void, because such assessments should have been made to the city of Lowell as the holder of the tax titles which were held to be invalid as stated above.

By G. L. (Ter. Ed.) c. 60, s. 78, "Before foreclosure or redemption, taxes on land taken or purchased by a town shall be assessed to the person to whom they would be assessed if the land had not been so taken or purchased." This section was repealed by St. 1936, c. 194. By G. L. (Ter. Ed.) c. 59, s. 11, taxes on real estate were assessable to the person who was either the owner "or in possession thereof," and it was provided that the record owner shall be deemed to be the true owner, "and so shall the person so appearing of record under a tax deed not invalid on its face." The quoted portions of the section were omitted

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when it was revised by St. 1936, c. 92. Accordingly, when the section was again revised by St. 1939, c. 175, real estate was made taxable to the "owner," and the record owner was deemed the true owner. We think that these statutory changes made it impossible after 1936 to tax real estate to a tax title holder. See Nichols, Taxation in Massachusetts (3d ed. 1938) 267, 268. Apparently the right to assess land to a tax title holder was the creature of express statute, and ceased when an express provision permitting such taxation was no longer to be found in the statute. *Burr* v. *Boston*, 208 Mass. 537, 543. We think the judge was right in ruling that the "taxes for the years 1937 to 1941, inclusive, were properly assessed to Marden & Murphy, Inc."

General Laws (Ter. Ed.) c. 60, s. 53, as appearing in St. 1933, c. 164, s. 3 provides that notice of the intention of the collection to take land for nonpayment of taxes shall be posted "in two or more convenient and public places." In the present case one notice was posted on the sign designating the office of the city treasurer and collector in the corridor of the Lowell city hall, and it is not questioned that that was a convenient and public place. The controverted question arises as to the other notice, which was posted in the men's reading room of the Lowell public or city library. It is not contended that that was not a "convenient" place. The respondent contends that as women would not be likely to visit the men's reading room, it was not a "public place." But it does not appear that women were excluded. The term "public" as applied to place, is not an absolute but a relative term, used in contradistinction to the term "private." *Cahoon* v. *Coe*, 57 N. H. 556, 595. *Bowker* v. *Semple*, 51 R. I. 142, 147, 148. Surely the men's reading room could not be called a "private" place. The only purpose of posting is to make it probable that knowledge of the proposed taking will reach the persons interested in the land. We think that the men's reading room was a "public place" within the meaning of the statute, even though it was not as completely public as some other places. The fact that in the collector's affidavit of the posting he stated that one notice was posted in the "reading room" instead of in the "men's reading room,"

is immaterial. Under the statute the fact as to the posting may be proved apart from the affidavit. G. L. (Ter. Ed.) c. 60, s. 57. *Southworth* v. *Edmands*, 152 Mass. 203, 208.

In the Land Court the respondent contended that the takings were invalid because at the time and place of taking the notice was not read and the collector did not state that the land of Marden & Murphy, Inc., was being taken. This point was merely mentioned in the brief of the respondent in this court, but was not argued, and consequently is treated as waived. *Commonwealth* v. *Gale*, 317 Mass. 274, 276.

The respondent contends that the collector of taxes was not lawfully authorized and qualified to make the tax taking in question. General Laws (Ter. Ed.) c. 60, s. 13, as appearing in St. 1941, c. 308, provides that the collector, before the commitment to him of any taxes of any year, shall give a bond or bonds for the faithful performance of his duties "in a form approved by the commissioner" of corporations and taxation, and in such sum "as shall be fixed by the . . . mayor and aldermen," whose powers the city council possess. The bonds given by the collector under that statute for the years 1940, 1941 and 1942 were approved by the commissioner and by the city council. Findings of fact to that effect were made by the judge. Besides, we think that the statute requiring bonds is intended for the protection of the city and is of no concern to the taxpayer. *Boston* v. *Barry*, 315 Mass. 572, 578.

The respondent contends that the taking was invalid as to parcel 1 because two contiguous parcels separately assessed were advertised and taken in one proceeding and as a single parcel. In 1938 a part of parcel 1, containing sixty-nine thousand three hundred thirty-nine square feet, was assessed to the respondent, and the remainder, containing nineteen thousand seven hundred forty square feet, was assessed to Proprietors of Locks and Canals on the Merrimack River, and was reassessed to the respondent on March 31, 1939. In *Marlborough* v. *Poorvu*, 305 Mass. 124, a tract of land which could have been taxed as a unit was in fact assessed in three separate though contiguous parcels. It was held that a tax lien covers only the same unit as

the assessment, and that the whole tract could not be sold as a whole for nonpayment of the combined tax upon the three parcels. See also *Shruhan* v. *Revere*, 298 Mass. 12. The judge was right in ruling the tax taking invalid as to parcel 1, and in dismissing the petition as to that parcel.

But we think that he was right in deciding in favor of the petitioner as to the other parcels. The respondent has presented to us a motion, assented to by the petitioner, to add to the record a transcript of the evidence, on the theory that this proceeding is in equity. See *Lynn Institution for Savings* v. *Taff*, 314 Mass. 380; *Harrington* v. *Anderson*, 316 Mass. 187; *Wareham Savings Bank* v. *Partridge*, 317 Mass. 83, 84. But without the transcript the record before us is sufficient to enable us to decide the case, and the result would not be changed if we were to consider the transcript. Since no useful purpose would be served by adding to the record, we deny the motion *pro forma*, without deciding the question of practice argued.

Decision affirmed.